No. 12966

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ESTHER WESTFALL
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
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REPLY BRIEF OF APPELLANT

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATIONS OF ERROR Nos. 1 AND 2

The appellee would have the court believe that there was nothing in the pleadings to raise the defenses of the statute of limitations and latches. It will be noted in paragraph IX of the plaintiff's complaint that there is an allegation as follows:

> "*That the negligent and wrongful acts and omissions of the defendant* through its agent and employee as aforesaid *were contrary to the laws of the State of Washington* and the ordinances of the City of Tacoma, in general, and of the parts thereof which are hereinabove set forth in particular, *and the same were done under circumstances where the defendant, if a private person, would have been liable to the plaintiff for the injuries and damages proximately resulting therefrom.*" (Emphasis supplied).

Paragraph IX of the complaint was denied in paragraph IX of the Answer which denies each and every allegation in paragraph IX of the complaint.

The ultimate fact pleaded in the above quoted paragraph from the complaint is that under the laws of the State of Washington the United States would be liable if it were a private person, and since this allegation is denied all of the issues of law and fact which would show that a private person would not be liable under the laws of the State of Washington are at issue. By making such an allegation the appellee anticipated the appellant's defense. When such an allegation is denied the defense thus raised is at issue. On pages 310 and 311 of 71 Corpus Juris Secundum the following will be found:

> "*Matters subject to denial.* The material facts alleged by plaintiff as constituting his cause of action may be denied. Facts not stated should not be denied, but a pleading is deemed to allege

> what may be implied from the allegations therein by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred. Immaterial or collateral matters need not be denied. *Issue may be taken on a defense anticipated by plaintiff in his complaint.*" (Emphasis supplied)

It would be a useless gesture for the appellant to reallege in its answer the ultimate fact, that the United States would not be liable if it were a private person under the laws of the State of Washington. On page 251 of Volume 71 Corpus Juris Secundum the following will be found:

> "Since the office of a plea is to set up facts which would otherwise not be apparent to the court, as discussed supra § 99, the plea or answer must set up matters not apparent from the declaration or complaint, *but it is not necessary to reallege the facts stated in the complaint.*" (Emphasis supplied)

If the appellee was not prepared to meet the issue on whether or not the appellant would be liable under the laws of the State of Washington, the appellee should not have set forth the allegations contained in paragraph IX of her complaint. However, the allegations thus being made and denied, the issues are raised by the pleadings.

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 3

The appellee would have the court believe that she and the other members of her group were making this trip under some sort of contractual obligation wherein the transportation was compensation for their services. There is not one iota of evidence in the entire record which would in any way intimate that there was any sort of contractual obligation on the part of anyone. Every person in the appellee's group made the trip solely for their own pleasure or as a chaperon. On page 53 of the transcript the appellee herself states that no one was being paid for making the trip and that the group was taking the trip voluntarily. On page 54 of the transcript the appellee advises the court that she was one of the chaperons. On page 55 of the transcript the appellee herself further advises that the members of her group enjoyed making such trips and that there was no compulsion on the part of anyone to make such trip, and further, that anyone could have refused to go. On page 56 of the transcript the appellee further advises that the Army personnel would serve refreshments to the members of the group. On page 64 of the transcript Mrs. Troxell, another member of the appellee's group, stated that she enjoyed taking such trips and that they were entirely voluntary

and that she went voluntarily because of such pleasure and enjoyment. On page 66 of the transcript, Mrs. Bruck, another adult accompanying the appellee's group, stated that she went along as a chaperon. On page 69 of the transcript Mrs. E. T. Holloway, another adult accompanying the group, stated that it was just a pleasure trip. Certainly there is nothing in the statements of the witnesses which in any way indicates that there was any thought of compensation for their services or that their services were in payment for their transportation.

The appellee would have the court believe that because the personnel at Fort Lewis were in uniform that any enjoyment or recreation on their behalf was a commercial enterprise of the United States of America. The situation here presented is no different from that of any individual who might invite a group of his friends to come to his house for a party, sending his own chauffeur after them. Here we have a group of young men in the Army and away from home where they have no resources of their own to transport their friends to places of social entertainment. The Army authorities permitted the use of government-owned transportation for these purposes.

Undoubtedly everyone is entitled to and must have some recreation in his life. If a private indi-

vidual invited a guest to his house for a party, that individual is undoubtedly deriving some benefit therefrom by way of recreation. However, it would be absurd to state that such was a benefit to the private individual in a substantial or material or business sense.

The Army personnel here involved are in exactly the same position as a private individual. The fact that the military personnel are human beings and enjoy social contact with other people does not turn such enjoyment into a commercial enterprise. The fact a private individual used the same vehicle that he uses in his business for transporting guests to his house for a party, does not render such transportation a business enterprise or in any way compensate the owner of the vehicle in a substantial or material or business sense. The carriage is gratuitous only.

The appellee would further have the court believe that the transportation was furnished by the military personnel in expectation of some material benefit from the appellee and other persons in her group. The fallacy in this reasoning lies in the fact that no one in the appellee's group was under any obligation to make the trip or perform any services whatsoever after having received the transportation.

Every person in the appellee's group made the trip voluntarily and for his own pleasure. The only possible relationship between the Army personnel and the appellee is that of host-guest.

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 4

The appellee would have the court believe that somehow or another she still owns part of the claim for the services of Dr. Seering. As stated in the following quotation from *United States v. Aetna Surety Co.*, 338 U.S. 366 at page 381, in cases of partial subrogation both the insured and the insurer must be named as parties plaintiff under Rule 17(a) of the Federal Rules of Civil Procedure.

> "In cases of partial subrogation the question arises whether suit may be brought by the insurer alone, whether suit must be brought in the name of the insured for his own use and for the use of the insurance company, or whether all parties in interest must join in the action. Under the common-law practice rights acquired by subrogation could be enforced in an action at law only in the name of the insured to the insurer's use, *Hall & Long v Railroad Companies*, 13 Wall. 367 (1872); *United States v. American Tobacco Co., supra*, as was also true of suits on assignments, *Glenn v. Marbury*, 145 U.S. 499 (1892). Mr. Justice Stone characterized this rule as 'a vestige of the common law's reluctance to admit that a chose in action may be assigned, (which) is today but a formality which has been widely

abolished by legislation.' *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 540 (1933). Under the Federal Rules, the 'use' practice is obviously unnecessary, as has long been true in equity, *Garrison v. Memphis Insurance Co.*, 19 How. 312 (1857), and admiralty, *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.*, 129, U.S. 397, 462 (1889). Rule 17(a) was taken almost verbatim from Equity Rule 37. No reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer 'own' portions of the substantive right and should appear in the litigation in their own names."

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 5

The appellee would have the court believe that the award of general damages in the sum of $7500.00 was justified on the basis of loss of earnings. The record clearly shows that instead of the appellee's earnings being decreased $50.00 per month the earnings have been virtually doubled since the date of the accident. The defendant's earnings for the school year for 1945-46 were set out in defendant's exhibit "F" on pages 101 and 102 of the transcript. This record shows that during the nine month period the appellee earned a salary of $800.50. This averaged approximately $90.00 per month. Thereafter, the appellee earned $180.00 per month, or double her previous earnings, while employed at Boeing Aircraft

Company. Thereafter, the appellee earned approximately $150.00 per month as a saleslady for Stanley Home Products. Thereafter, the appellee again worked as a school teacher on Vashon Island earning $212.00 per month. Thereafter the appellee has worked as a saleslady for Real Silk Hosiery earning something in excess of $150.00 per month. With such increase of earnings there can be no justification for the award of $7500.00 for a sprained ankle and a sprained back on basis of loss of earnings. As pointed out in the appellant's opening brief, the appellee's troubles stemmed from overweight and poor posture rather than any injuries caused by appellant.

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATIONS OF ERROR Nos. 6 AND 7

It will be noted that the appellee refuses to discuss or argue the points raised in appellant's brief on specifications of error Nos. 6 and 7. The obvious reason for such refusal lies in the fact that there is no answer to the points raised by the appellant. The physical facts, as stated by the appellee herself clearly negative any negligence on behalf of the appellant.

The appellee would have the court believe that Mr. Yingling, the driver of appellant's bus, was not the true driver of such bus. Mr. Yingling definitely identified Mrs. Westfall as the person involved in

this accident. (Tr. 117 and 118) It will be noted that in both the complaint and the appellee's testimony the appellee scrupulously avoids naming or identifying the driver of the bus. (Tr. 9 and 34) It would thus appear that the appellee was placing herself in a position where she could deny the appellant's testimony as to the driver of the bus no matter who was presented as the driver of the bus. The appellee scrupulously avoided bringing this action until she had lost over 75 pounds in weight, thus materially changing her physical appearance and making it difficult for any one to recognize her.

Mr. Yingling squarely contradicted the testimony of the appellee. Likewise, Miss Beverly Bruck, daughter of one of the appellee's witnesses, squarely contradicted the appellee. Both of these witnesses stated that the appellee was sitting sideways in her seat talking to persons in the rear of the bus. Had the appellee actually been frightened by the manner in which the bus was being driven she would have been facing towards the front anticipating danger.

The appellee further states on page 38 of her brief:

> "Occupants of other seats were not thrown from their seats when the accident occurred since the backs of seats in front of them provided a guard."

There is not one iota of evidence that anyone was thrown against the back of the seat in front of them.

REPLY OF APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 8

The appellee would have the court believe that the trial judge deliberated quite some time before rendering a decision. As the record shows (Tr. 165) immediately upon both sides resting, the court stated:

> "I am persuaded that the plaintiff has made out a case. The court will find negligence on the part of the driver of the bus proximately causing injuries to the plaintiff and that the plaintiff, herself, was free of contributory negligence."

The court thus made this finding without any argument whatever from counsel on either side. There was no opportunity whatever for the appellant to make an argument.

The appellee now contends that the appellant should have requested leave to make an oral argument. It would certainly be ridiculous to require counsel to spring to their feet immediately upon the conclusion of the evidence and ask leave of the court to make an oral argument. It is a duty of the court to afford counsel that opportunity before a decision is rendered. Once a decision has been rendered an oral argument is a useless gesture. Once the trial

judge has orally and publicly committeed himself as to his findings he has placed himself in a position where it would be highly embarrassing to admit that he was wrong after hearing argument from the losing side. To do so would subject the trial judge to severe criticism for vacillating.

Despite appellee's argument to the contrary, the trial court did not assure counsel for appellant every opportunity to be heard, but on the contrary, merely gave counsel for appellant an opportunity to file a written memorandum, and this was done only after the court had announced its findings of fact and it was made kown to the court that there were some laws that the court had obviously overlooked. The trial judge then condescended to allow a "short memorandum" to be filed setting forth the authorities on the guest statute of the State of Washington. This was by no means an opportunity to make an oral argument on the entire case, a substantial right to which the appellant is entitled.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 9

It is to be noted that the appellee refuses to make any argument whatever with regards to appellant's specification of error No. 9. The obvious reason for this is that the trial judge was clearly in error.

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 10

The appellee would have the court believe that the appellant was seeking to elicit testimony from Mr. Barton which would impugn the appellee's general educational qualifications. Although the appellee may not have had proper general educational qualifications to enable her to hold a job as a teacher, the appellant was not seeking to elicit such facts. As clearly shown by the record (Tr. 94) the appellant was seeking to show a written report revealing the appellee's lack of physical impairment made by the witness at a time when his knowledge of such facts was fresh in his memory.

CONCLUSION

The appellant having completely answered every argument of the appellee set forth in her brief, respectfully requests this court to remand this case to the District Court with instructions to enter judgment for the appellant.

Respectfully submitted

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